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No. 82-344

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED OIL MANUFACTURING CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the National Labor Relations Board reasonably concluded that petitioner's unfair labor practices rendered a fair election unlikely and that a bargaining order was therefore an appropriate remedy.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 672 F. 2d 1208. The decision and order of the National Labor Relations Board (Pet. Supp. App. A30-A37) are reported at 254 N.L.R.B. 1320.

JURISDICTION

The judgment of the court of appeals (Pet. App. A27) was entered on April 19, 1982. A petition for rehearing (Pet. App. A28-A29) was denied on May 17, 1982. The petition for a writ of certiorari was filed on August 13, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (29 U.S.C. 151 *et seq.*), are set forth at Pet. 4.

STATEMENT

1. Petitioner is engaged in the operation of a gasoline and diesel fuel station, store, and motel located at a truck stop in Kylertown, Pennsylvania. In late October 1979, the Union[1] commenced an organizational campaign among the employees at these facilities (Pet. Supp. App. A41). By November 11, a majority of the employees had signed authorization cards designating the Union as their collective bargaining representative (Pet. Supp. App. A33). Petitioner refused to bargain with the Union. On November 12, the employees went on strike, and the strike continued until March 10, 1980, when an unconditional offer to return to work was made on behalf of the strikers (Pet. Supp. App. A42).

The Board found that petitioner had violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), prior to the strike by coercively interrogating an employee concerning the union activity of other employees, by instructing him to report on the union activity of other employees, and by granting wage increases and promotions to six of the 29 unit employees for the purpose of discouraging union activity (Pet. Supp. App. A31-A32). The Board further found that petitioner had violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), after the strike ended by denying overtime work and pay to certain returning strikers and thereby failing to grant proper reinstatement (Pet. Supp. App. A32). Finally, the Board found that these unfair labor practices had made a fair election unlikely, if not impossible (Pet. Supp. App. A32). Accordingly, the Board found that petitioner had violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5), by refusing to bargain with the Union, which had obtained

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[1]Amalgamated Food Employees Union Local 590, affiliated with United Food and Commercial Workers International Union, AFL-CIO (Pet. Supp. App. A33).

authorization cards from a majority of the employees in a appropriate unit (Pet. Supp. App. A33). The Board ordered petitioner, inter alia, to bargain with the Union upon request (Pet. Supp. App. A34-A35).

2. The court of appeals sustained the Board's findings and enforced its order (Pet. App. A1-A26). The court noted that the unfair labor practices affected a substantial percentage of the employees directly and were communicated to other employees as well; that those practices were committed by the most senior official at the truck stop; that they conveyed to the employees the message, which could not easily be erased, that petitioner had the economic means to achieve the result it desired by either rewarding or punishing employees; and that the post-strike violations had reinforced the effects of the pre-strike violations. The court held that, in these circumstances, the Board had not exceeded its broad remedial authority, recognized in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), in concluding that petitioner's unfair labor practices made a fair election unlikely and that a bargaining order was therefore warranted (Pet. App. A8-A12; see also Pet. App. A14-A15 (concurring opinion)).[2] A petition for rehearing in banc was denied (Pet. App. A28-A29).

ARGUMENT

1. In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 613-614 (1969), this Court held that the Board has authority to issue a bargaining order, not only in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices, but also in "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." This Court further pointed out (*id.* at 612

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[2]Senior Circuit Judge Van Dusen disagreed that a bargaining order was appropriate here (Pet. App. A16-A26).

n.32) that "[i]n fashioning its remedies under the broad provisions of § 10(c) of the Act (29 U.S.C. 160(c)), the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." Petitioner concedes (Pet. 6) that "the propriety of a bargaining order is a factual conclusion in every case," but it challenges the factual conclusion of the Board, which was affirmed by the court of appeals, that a bargaining order was necessary to remedy the unfair labor practices in this case. Thus, this case presents only a factual issue that does not merit further review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).[3]

In any event, the Board's finding that a fair election was unlikely here is clearly justified in light of the small size of the bargaining unit; the extensive pre-strike unfair labor practices, which directly affected a substantial percentage of the unit employees and were communicated to all others; and the additional unfair labor practices committed after the strike ended. Moreover, petitioner's unlawful conduct was aimed at some of the leading union adherents and included a combination of unlawful wage increases and discrimination against union supporters—measures which demonstrated that petitioner would use either the carrot or the stick to defeat the Union.

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[3]Petitioner relies (Pet. 9-10) on the fact that the administrative law judge reached a conclusion contrary to that of the Board with respect to the necessity of a bargaining order. However, as this Court noted in *Universal Camera, supra*, 340 U.S. at 496, the significance of an administrative law judge's decision contrary to that of the Board "depends largely on the importance of credibility in the particular case." Here, the Board did not reverse any of the law judge's credibility findings, but merely drew a different legal conclusion from the established facts. Accordingly, the court below properly gave little weight to the law judge's conclusion (Pet. App. A12 n.4, A15 n.1). See *Oil Workers International Local 4-243* v. *NLRB*, 362 F. 2d 943, 946 (D.C. Cir. 1966).

2. Petitioner argues (Pet. 8-13) that the decision of the court of appeals is contrary to that court's earlier decision in *NLRB* v. *K & K Gourmet Meats, Inc.*, 640 F. 2d 460 (3rd Cir. 1981). Even if it were true that the decision below created an intra-circuit conflict, that would not warrant review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). Moreover, the facts in *K & K Gourmet Meats, Inc.* are clearly distinguishable from those here.

In *K & K Gourmet Meats, Inc.*, the only unfair labor practices were promises of benefits, and an unkept promise is unlikely to influence employee behavior in a way desired by management. The instant case, on the other hand, involves a *grant* of benefits. As the Court noted in *NLRB* v. *Exchange Parts Co.*, 375 U.S. 405, 409 (1964), such conduct carries with it "the suggestion of a fist inside the velvet glove" and "the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." Moreover, as the Board has explained, its traditional remedies do not include rescission of an unlawfully granted wage increase. Consequently, such remedies cannot be employed to eliminate the impact of the wage increase on employee free choice and thus make a fair election possible. *Skaggs Drug Centers, Inc.*, 197 N.L.R.B. 1240, 1241 (1972).

Finally, in *K & K Gourmet Meats, Inc.*, no additional unfair labor practices were committed after the employees went on strike. The court in that case viewed the strike as evidence that the employees did not believe the promises of benefits, and nothing happened thereafter to cause the employees to take the promises more seriously. 640 F. 2d at 470. In the instant case, petitioner continued its unlawful conduct after the strike ended by discriminating against three employees, all of whom had previously been granted or promised wage increases and one of whom was the

known leader of the Union's campaign.[4] The Board properly viewed this post-strike conduct as exacerbating the coercive effect of the unlawful wage increases, since it made explicit the presence of the "fist inside the velvet glove" suggested by the wage increases.[5]

3. The cases from other circuits upon which petitioner relies (Pet. 13-14) are also clearly distinguishable. In *NLRB* v. *Chatfield-Anderson Co.*, 606 F. 2d 266, 269 (9th Cir. 1979), most of the unlawful conduct was expressly disavowed by the company president, and the court viewed the remaining violations as "almost trivial." Similarly, in *Peerless of America, Inc.* v. *NLRB*, 484 F. 2d 1108, 1120-1121 (7th Cir. 1973), the court relied on the marginal nature of the violations, as well as the company president's statement that any unlawful conduct was against his express instructions and would not recur. In *NLRB* v. *Pilgrim Foods, Inc.*, 591 F. 2d 110, 120 (1st Cir. 1978), the violations ceased when higher management was informed of them, and the supervisor who committed the violations left the company's employ, thereby diminishing the continuing impact of his conduct.

Finally, in *NLRB* v. *Pace Oldsmobile, Inc.*, 681 F. 2d 99, 101-102 (2d Cir. 1982), the court did not hold that a bargaining order was inappropriate, but found that the Board had not sufficiently explained the need for such an order and

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[4]Petitioner's characterization of this discrimination as "a virtually inadvertent technical violation" (Pet. 12) merely takes issue with the Board's contrary finding (Pet. Supp. App. A32), which was affirmed by the court of appeals (Pet. App. A11, A14-A15).

[5]To the extent that *K & K Gourmet Meats, Inc.* held that the Board cannot consider pre-strike, as well as post-strike, conduct in assessing the need for a bargaining order, it was overruled by the Third Circuit's subsequent en banc decision in *NLRB* v. *Permanent Label Corp.*, 657 F. 2d 512, 519 (1981).

remanded the case for further consideration. In the instant case, the unfair labor practices were committed by the highest official at petitioner's truck stop, and petitioner not only did not disavow the violations, but committed additional unfair labor practices after the strike. Moreover, the Board explicitly set forth (Pet. Supp. App. A32) its reasons for issuing a bargaining order.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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